NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1147-MkPaJu
GLOBAL AIRCRAFT SOLUTIONS, INC.,	Bk. No. 09-01655
	Adv. No. 09-00609
Debtor.	
LEADING EDGE GROUP, LLC,	
Appellant,	
v.	**M E M O R A N D U M**[*]
HAMILTON AEROSPACE TECHNOLOGIES, INC.; FRANK T. HUNDLEY, Chapter 11 Trustee,	
Appellees.	

Argued and Submitted on February 17, 2011
at Phoenix, Arizona

Filed - May 11, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding

Appearances: C. Randall Stone, Esq., Stone Law Firm, PLC, argued for Appellant Leading Edge Group, LLC
Anthony W. Austin, Esq., Lewis and Roca, LLP, argued on behalf of Appellee Frank T. Hundley, Chapter 11 Trustee
Robert M. Charles, Jr., Esq., Lewis and Roca, LLP argued on behalf of Appellee Hamilton Aerospace Technologies, Inc.

Before: MARKELL, PAPPAS and JURY, Bankruptcy Judges.

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[*]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Leading Edge Group, LLC ("LEG") appeals the bankruptcy court's judgment in favor of the bankruptcy trustee for Hamilton Aerospace Technologies, Inc.[1] ("HAT") on HAT's complaint seeking unpaid storage fees and to foreclose certain liens HAT held on property owned by LEG and either stored at HAT's facilities or held as security by HAT.[2] LEG also appeals the order denying its motion for reconsideration. We AFFIRM both orders.

I. FACTS

A. Storage Fees, Settlement, and Garageman's Lien Sale

This controversy centers on a Boeing 727-200 Airframe, Tail No. N8881z, MSN 21578 ("Airframe"), and a Universal UNS-1C Navigation Unit ("Navigation Unit"). The Airframe was stored at HAT's facility in Tucson, Arizona prior to LEG's acquisition of the Airframe, and it continued to be stored there after LEG purchased it on or around June 1, 2006. It does not appear that LEG ever took physical delivery of the Airframe after its purchase. When HAT became aware that LEG was the owner of the Airframe, it communicated via email to LEG that it would charge LEG $4,500 per month to store the Airframe at HAT's facility. HAT also included a proposed storage contract in the email;

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[1]From a review of the bankruptcy court's docket, it appears that Global Aircraft Solutions, Inc., Hamilton Aerospace Technologies, Inc., World Jet Corporation, and Hamilton Aerospace Mexico S.A. de C.V. are all affiliates of one another. The bankruptcy court authorized the joint administration of these cases on February 2, 2009.

[2]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All Civil Rule references are to the Federal Rules of Civil Procedure.

however, LEG did not sign the document. Id. Nevertheless, LEG neither removed the Airframe from HAT's facility nor objected to the $4,500 monthly charge.

LEG did not make sufficient payments for the continued storage of the Airframe, and, on November 7, 2007, HAT sent LEG a demand letter in which it stated its intention to sell the Airframe at public auction to satisfy the unpaid storage fees.

On December 14, 2007, the parties met to discuss a resolution of the storage fee issue. During the course of that meeting, the parties agreed that the amount owed, calculated at $81,000 (or $4,500 per month for 18 months), would be discounted, to a total cost of $53,095 covering the period beginning with LEG's acquisition of the Airframe and ending on December 31, 2007. The amount due was to be paid in two installments, the first payment due on December 28, 2007 in the amount of $25,000 and the balance due by January 31, 2008. Per this agreement, the monthly rate for storage would increase to $4,500 per month on January 1, 2008.

As consideration for the reduction in payment, HAT asked for, and was granted, two additional covenants in the agreement: (1) If LEG defaulted on either of the two payments, LEG would lose the discount, and the full $81,000 (calculated at $4,500 per month) for storage would be due for the entire storage period; and (2) LEG was required to physically deliver the Navigation Unit to HAT for HAT to hold as collateral for LEG's performance under the settlement agreement.

HAT sent LEG a confirmation letter, to which LEG responded on December 21, 2007. In its response, LEG attempted to reserve

property rights in the Navigation Unit, unilaterally attempted to remove the expiration date of the parking discount, and stated its intent to mail a follow-up letter back to HAT. It does not appear that any such follow-up letter was ever mailed. Regardless, it appears that both HAT and LEG considered the agreement valid prior to LEG's attempted unilateral modification, as LEG made the first payment of $25,000 contemplated by the agreement on or around January 3, 2008, which HAT accepted. LEG had also delivered the Navigation Unit to HAT. LEG stated its intention to make the final payment of $28,095 by February 21, 2008, and then retrieve the Navigation Unit it had previously delivered to HAT. This payment, however, was never made.

After LEG failed to make the final payment, HAT considered the agreement void according to its terms, provided notice to LEG of its intent to sell both the Airframe and the Navigation Unit, and then did, in fact, hold a public auction of both these items on August 6, 2009. The Trustee entered a credit bid of $85,000 for the Airframe and the Navigation Unit. There were no other bidders.

B. The Adversary Proceeding in the Bankruptcy Court

The Trustee, on behalf of HAT, filed an adversary complaint against LEG on June 3, 2009. In the complaint, the Trustee asserted claims for breach of contract, quantum meruit, and to foreclose the mechanic's lien. HAT also sought appropriate attorneys' fees. LEG filed an answer and asserted a counterclaim with respect to the Navigation Unit. LEG also sought appropriate attorneys' fees.

After HAT had completed its sale of the Airframe and the

Navigation Unit, LEG filed a motion with the bankruptcy court to set aside the sale and alleged various deficiencies of the completed sale.

HAT filed a response to this motion and alleged that it needed neither LEG's consent nor the bankruptcy court's approval before it conducted the sale.[3] HAT further alleged that the sale of the Airframe and the Navigation Unit was, thus, proper under Arizona law.

In relevant part, after trial the bankruptcy court made the following findings in a memorandum decision:[4]

- LEG had granted HAT a security interest in the Navigation Unit, to secure payment of the storage charges, as envisioned by the settlement reached between the parties.
- The security agreement was confirmed by the follow-up letter sent by HAT, and LEG's contention that it retained title to the Navigation Unit until it was sold was "not inconsistent with the grant of a security interest."
- HAT's security interest in the Navigation Unit was perfected when LEG delivered possession of the Navigation Unit to HAT.
- A preponderance of the evidence "supports the legal validity" of the foreclosure sale, completed under Arizona law that grants liens to garagemen, of the Airframe and Navigation Unit.

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[3]Indeed, during oral argument, counsel for Appellee Frank T. Hundley, Chapter 11 Trustee, indicated to this Panel that the purpose for filing the adversary proceeding was to preserve a potential deficiency claim against LEG.

[4]Unless the recited finding is enclosed in quotation marks, this recitation paraphrases the bankruptcy court's language.

- The sale of the Airframe and Navigation Unit was completed in a commercially reasonable manner.
- An implied contract existed for the payment of $4,500 in monthly storage fees by LEG to HAT.
- If an implied contract did not exist, an express contract to pay $4,500 per month in storage fees existed between HAT and LEG.
- HAT was entitled to reasonable attorneys' fees and costs under Arizona law.

After entry of the memorandum decision on January 26, 2010, LEG filed a motion for reconsideration on March 4, 2010. The court treated this as a motion under Civil Rule 60, held that the issue raised by the motion for reconsideration was not "within the scope of the parties' joint pretrial statement" and presented "an entirely new issue not otherwise raised in the context" of the adversary proceeding. The bankruptcy court accordingly denied the motion in a separate memorandum decision.

The bankruptcy court entered judgment in favor of HAT on April 16, 2010. The judgment awarded HAT:

- Unpaid storage fees in the amount of $59,100.00, with statutory interest until paid, at the rate of 10% per annum.
- Attorneys' fees in the amount of $23,143.50 and costs in the amount of $2,545.26, with statutory interest until paid, at the rate of 10% per annum.

The judgment further held that:

- HAT's foreclosure of the storage lien on the Airframe was valid.
- The Uniform Commercial Code lien on the Navigation Unit was

valid, as was the foreclosure of that lien.

The court's memorandum decision explicitly stated that any appeal should be taken from the subsequent judgment and not from the memorandum decision itself. Therefore, LEG's appeal from the judgment, filed April 29, 2010, was timely.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158(a)(1).

III. ISSUES

1. Whether the bankruptcy court's determination that the parties entered into a contract regarding the amount of rent due to HAT for storage of the Airframe was reversible error.
2. Whether the bankruptcy court's determination that the storage lien foreclosure procedure complied with Arizona law was reversible error.
3. Whether the bankruptcy court's determination that HAT had a valid lien on the Navigation Unit was reversible error.
4. Whether the bankruptcy court's denial of Defendant's Motion for Reconsideration was an abuse of discretion.
5. Whether the bankruptcy court's decision to not hold a hearing and not issue a ruling prior to the sale of the Airframe was an abuse of discretion.
6. Whether HAT, as appellee, is entitled to an award of attorneys' fees incurred as a result of the present appeal.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's findings of fact for clear error. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th

Cir. BAP 2009); Rule 8013. Clear error exists when the court's findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" U.S. v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" Donald v. Curry (In re Donald), 328 B.R. 192, 203 (9th Cir. BAP 2005) (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985)); Rifino v. United States (In re Rifino), 245 F.3d 1083, 1086-87 (9th Cir. 2001). Additionally, a clearly erroneous finding of fact does not always justify reversal; we must ignore harmless error. Litton Loan Serv'g, LP v. Garvida (In re Garvida), 347 B.R. 697, 704 (9th Cir. BAP 2006) (citing 28 U.S.C. § 2111, Rule 9005, Civil Rule 61, and Donald, 328 B.R. at 203-04).

We review a bankruptcy court's legal conclusions, including its interpretation of the Bankruptcy Code and state law, de novo. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880 (9th Cir. BAP 2005), aff'd 241 Fed. Appx. 420 (9th Cir. 2007). De novo review requires that the matter be considered anew, as if it had not been heard before, and as if no decision had yet been rendered. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988). When this Panel undertakes de novo review, the case is viewed from the same position as it was in the bankruptcy court. See Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002).

Relevant to the case now before the Panel, determinations of whether a foreclosure proceeding was legally conducted pursuant

to state law are to be reviewed de novo. Lindsay v. Beneficial Reins. Co., 59 F.3d 942, 949 (9th Cir. 1995).

The decision of whether to hold a hearing on a given matter is "within the sound discretion of the [bankruptcy] court." Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th Cir. 2004). Therefore, we review a bankruptcy court's decision of whether to hold a hearing "for an abuse of discretion." Zurich Am. Co. V. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc., 503 F.3d 933, 939-40 (9th Cir. 2007).

We review the bankruptcy court's denial of a motion for reconsideration under Civil Rule 60 for abuse of discretion. Weiner v. Perry (In re Weiner), 161 F.3d 1216, 1218 (9th Cir. 1998). Under the abuse of discretion standard, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." Hinkson, 585 F.3d at 1262. If the bankruptcy court identified the correct legal rule, we then determine under the clearly erroneous standard whether its factual findings and its application of the facts to the relevant law were: "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks omitted).

V. DISCUSSION

A. Existence of a Valid Contract

This Panel agrees with the bankruptcy court that Arizona law governs this question. In Arizona, a valid contract is formed when there has been "an offer, acceptance, consideration, a sufficiently specific statement of the parties obligations, and mutual assent." Muchesko v. Muchesko, 955 P.2d 21, 24 (Ariz. Ct.

App. 1997) (citing Savoca Masonry Co., Inc. v. Homes & Son Constr. Co., 542 P.2d 817, 819 (Ariz. 1975). Manifestation of acceptance can be either express or implied; however, "[t]here can be no implied contract where there is an express contract between the parties in reference to the same subject matter." Chanay v. Chittenden, 563 P.2d 287, 290 (Ariz. 1977).

This Panel further agrees with the bankruptcy court that the existence and specific terms of an implied contract "may be inferred from the statements and conduct of the parties" thereto. Beaudry v. Ins. Co. of the W., 50 P.3d 836, 839 (Ariz. Ct. App. 2002) (stating that "terms of a contract may be expressly stated or may be inferred from the conduct of the parties"). Furthermore, under Arizona law the "determination of the parties' intent must be based on objective evidence, not the hidden intent of the parties." Tabler v. Indus. Comm'n of Ariz., 47 P.3d 1156, 1159 (Ariz. Ct. App. 2002).

The bankruptcy court was also correct as to the law it applied with regard to express contracts. In Arizona, "[a]n express contract is ordinarily thought of as an actual agreement reached by parties who have openly uttered or declared the terms thereof at the time of making it, either orally or in writing." Alexander v. O'Neil, 267 P.2d 730, 734 (Ariz. 1954). "[A]n oral settlement agreement may bind the parties in contract, even though their written agreement is not formally executed, as long as it is clear that the parties intended to be so bound." Tabler, 47 P.3d at 1159 (citing AROK Constr. Co. v. Indian Constr. Serv., 848 P.2d 870, 876 (Ariz. Ct. App. 1993); Restatement (Second) of Contracts § 27 (1981)).

Because the bankruptcy court correctly identified and applied to this issue the appropriate legal principles, all that remains for this Panel to review is whether the bankruptcy court's factual findings supporting the legal conclusion that an implied or express contract existed were clearly erroneous.

The bankruptcy court's determination that an implied contract existed is amply supported by the record, as discussed above. The bankruptcy court specifically found that LEG was "advised early and often" that HAT charged $4,500 per month for storage of the Airframe. LEG failed to object, and failed to move the Airframe to an alternative storage location. When objectively reviewing the conduct of the parties, this Panel is left with no other conclusion than that LEG entered into an implied contract with HAT, at the rate of $4,500 per month, for storage of the Airframe. LEG's "inaction created an implied agreement to pay for the known storage fees." As the determination that an implied contract existed between HAT and LEG is well supported by the evidence presented, it follows naturally that the bankruptcy court's determination was not clearly erroneous.[5]

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[5]Further support for this conclusion may be found in the Restatement (Second) of Contracts. "Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance" when "an offeree takes the benefit of the offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation." Restatement (Second) of Contracts § 69 (1981). Here, LEG's silence operated as acceptance because it took the benefit of the storage service offered by HAT, while being accorded a more than reasonable opportunity to reject them. LEG knew that the services were offered with the expectation of

(continued...)

The bankruptcy court held, and this Panel affirms, that the parties entered into an implied contract when LEG became aware of the storage fee charged and then allowed, without objection, the Airframe to remain at HAT's storage facility.

The subsequent settlement agreement either modified the preexisting implied agreement or created a new and separate agreement. See Chanay, 563 P.2d at 290 (stating that where there is an implied contract, there can be no express contract). However, even if no implied contract existed, the settlement agreement between the parties, by its terms, would have served to create an express contract. This Panel finds that the bankruptcy court's alternative determination that an express contract arose by virtue of the settlement agreement is well supported by the evidence presented, and, thus, is not clearly erroneous.

B. Foreclosure of Storage Lien

Arizona law grants "proprietors of garages and service stations . . . a lien upon motor vehicles of every kind and aircraft . . . for labor, materials, supplies, and storage for the amount of charges, when the amount of charges is agreed to by the proprietor and the owner." Ariz. Rev. Stat. § 33-1022(A) ("Garagemen's Statute"). If the owner of the property upon which the garageman has a lien fails to pay charges for twenty days after they come due, the lienholder "may notify the owner . . . to pay the charges." Ariz. Rev. Stat. § 33-1023. If the property owner's "residence is not in the county where the

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[5](...continued)
compensation due to HAT's explicit communication to LEG of the storage fee to be charged.

property is located," the lienholder need not give notice of default before then proceeding to sell the property; in all other cases notice of default and ten days to cure is required. Id. The lienholder is in all cases required to provide five days notice of the public auction, if the property owner's location is known or can be ascertained. Id.

As stated above, the bankruptcy court correctly determined that an agreement between HAT and LEG existed. Therefore, the amount to be charged for storage was the amount "agreed to by the proprietor and the owner" of the property in that contract. Fees for storage of aircraft are specifically included in the statute. The relationship between HAT and LEG is firmly within the scope of the statute. Because the relationship between the parties is governed by the Garagemen's Statute, the conclusion follows that under that statute, a lien to secure payment of charges owed from LEG to HAT attached to the Airframe at the time the agreement was entered into.

The record supports the bankruptcy court's finding that HAT complied with the other requirements of Arizona's Garagemen's Statute. HAT provided notice of default and intention to sell to LEG on November 3, 2008. Again, on July 17, 2009, the Bankruptcy Trustee, on behalf of HAT, gave notice to LEG of its default and provided it twenty days to cure. This notice further stated that if the amount owed was not paid within the time to cure, a public auction of both the Airframe and the Navigation Unit would be held on August 6, 2009, well over the minimum five-day notice of sale required by the Garagemen's Statute.

Nothing in the Garagemen's Statute requires court approval

before the garageman may foreclose the statutory lien, hold an auction, and apply the proceeds to collateral. Additionally, HAT's trustee complied with all of the applicable requirements of the pertinent statutes. Having reviewed this issue of law de novo, we agree with and affirm the bankruptcy court's conclusion, that both the foreclosure of the storage lien on the Airframe and the public auction of the same were proper under Arizona law.

C. Existence of Valid Lien on Navigation Unit

The bankruptcy court found that possession of the Navigation Unit was given to HAT by LEG as collateral to secure its performance under the settlement agreement.[6] This Panel agrees with the bankruptcy court's characterization.[7] By virtue of the settlement agreement reached between the parties, LEG delivered the Navigation Unit to HAT as security for its performance of LEG's obligations under that agreement.

Under Arizona law, security interests of this type are governed by Article 9 of Arizona's Uniform Commercial Code. Specifically, a security interest is created when: (1) value is given, (2) the debtor has rights in the property offered as collateral or the power to transfer rights in the collateral to a

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[6]It may also fairly be said that the pledge of the Navigation Unit as collateral was the consideration for the agreement. HAT may have agreed to accept less than it was contractually owed for storage fees in consideration for the collateral securing payment that it received.

[7]During argument before this Panel, counsel for LEG characterized the status of the Navigation Unit, when in HAT's possession, as contingent security. While counsel for LEG did not find this characterization odd, the Panel does, and accordingly declines to adopt it.

secured party, and (3) the debtor either has authenticated a security agreement that provides a description of the collateral or the collateral is in the possession of the secured party. Ariz. Rev. Stat. § 47-9203. Neither party alleges that an authenticated, and thus signed, security agreement was entered into between the parties. However, LEG delivered possession of the Navigation Unit to HAT. Upon this delivery, HAT had a valid security interest in the Navigation Unit, and its security interest was perfected by possession of the collateral. Id.; Ariz. Rev. Stat. § 47-9313. While LEG continued to maintain its ownership interest in the Navigation Unit, HAT also had a security interest in the Navigation Unit, beginning when possession was delivered to HAT and continuing until the auction of the property. HAT was not required to file a financing statement or any other statement to maintain its perfection or priority. Ariz. Rev. Stat. §§ 47-9310, 47-9313.

As a secured party, HAT had the option of selling its collateral, the Navigation Unit, when LEG defaulted on the settlement agreement, provided that its sale of the collateral complied with Arizona law. Following LEG's default, HAT was authorized to "sell, lease, license or otherwise dispose of any or all of the collateral in its present condition . . . ." Ariz. Rev. Stat. § 47-9610. "Every aspect of [the] disposition, including the method, manner, time, place, and other terms, must [have] been commercially reasonable." Id. HAT disposed of this collateral via public auction, held after LEG received proper notice. The bankruptcy court determined, as do we, that the method of sale employed by HAT was commercially reasonable under

the circumstances.

After considering de novo whether HAT held a valid security interest in the Navigation Unit under Arizona law, and whether it sold its collateral in compliance with Arizona law, this Panel concludes that it did.

D. Motion for Reconsideration

The bankruptcy court applied the correct standard under Civil Rule 60 in evaluating LEG's Motion for Reconsideration, and we see no error in the bankruptcy court's application of that standard. Accordingly, the bankruptcy court did not abuse its discretion when it denied LEG's Motion for Reconsideration.

E. Hearing Requirement

As discussed above, HAT's lien on the Airframe arose by operation of statute and the parties' agreement. The security interest in the Navigation Unit arose under the settlement agreement reached between the parties and was perfected upon delivery of the Navigation Unit to HAT by LEG. Also as discussed above, neither the Garagemen's Statute nor the Uniform Commercial Code require an in-court hearing or a ruling before HAT could properly dispose of the Airframe and Navigation Unit. In its Opening Brief for the present appeal, LEG argues that because there was no agreement, HAT was required to obtain a judgment or court order prior to the public auction. As discussed above, there was an agreement, and HAT's sale was properly conducted as to both the Airframe and the Navigation Unit. Therefore, the bankruptcy court was not required to hold a hearing before the sale in question took place, and the failure to do so does not constitute reversible error.

F. Attorneys' Fees on Appeal

Arizona law provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Ariz. Rev. Stat. § 12-341.01. Under this statute, "the prevailing party is also entitled to fees on appeal." In re Holiday Mobile Home Resorts, 803 F.2d 977, 979 (9th Cir. 1986) (citing Wenk v. Horizon Moving and Storage Co., 639 P.2d 321, 323 (Ariz. 1982). When exercising discretion to award fees, courts are to consider six pertinent factors: (1) the merits of the claim or defense presented by the unsuccessful party, (2) the novelty of the legal question presented and whether such a claim has previously been decided in the jurisdiction, (3) whether the successful party prevailed with respect to all claims, (4) whether an award of fees would discourage other parties with tenable claims from litigating legitimate contract issues, (5) whether litigation could have been avoided such that the successful party's efforts were superfluous, and (6) whether awarding fees would impose an extreme hardship on the unsuccessful party. Associated Indem. Corp. v. Warner, 694 P.2d 1181, 1184 (Ariz. 1985).

The bankruptcy court awarded attorneys' fees, and LEG did not appeal this award. The Trustee has similarly requested an award of fees on appeal. After considering the above factors, we conclude that attorneys' fees for the instant appeal are appropriate. However, in recognition of the bankruptcy court's essential competency in this area and its familiarity with the parties, we remand to the bankruptcy court the specific determination of the amount of attorneys' fees to be awarded,

such fees to be awarded consistent with the above enumerated factors.

VI. CONCLUSION

For all of the reasons set forth above, the judgment of the bankruptcy court and its denial of LEG's Civil Rule 60 motion are each AFFIRMED. Furthermore, the Panel REMANDS to the bankruptcy court the determination of reasonable attorneys' fees for this appeal under Ariz. Rev. Stat. § 12-341.01(A).